STATE OF MICHIGAN

COURT OF APPEALS

OMAR AMMORI, MANAL YALDOO, and MICHAEL YALDOO,

Plaintiffs-Appellees,

v

JAMES NAFSO, SYLVIA NAFSO, and JSN SYSTEMS, LLC, f/k/a CAMBRIDGE PAYMENT SYSTEMS, LLC,

Defendants-Appellants.

and

LAITH YALDOO and SABER AMMORI ,

Third-Party Defendants.

UNPUBLISHED
January 28, 2014

No. 312498
Oakland Circuit Court
LC No. 2009-105959-CK

Before: SAAD, P.J., and CAVANAGH, and K. F. KELLY, JJ.

PER CURIAM.

Though it appears to be a typical appeal from a denial of summary disposition, this case is actually quite unusual. Plaintiffs opposed defendants-appellants' motion for summary disposition, and the applicable standard of review requires that our Court view their proffered evidence as true. But, if accepted as fact, plaintiffs' evidence has proved too much, in that it establishes the existence of fraud—fraud which serves as a complete bar to plaintiffs' relief. Accordingly, we reverse the ruling of the trial court and grant defendants' motion for summary disposition.

I. FACTS AND PROCEDURAL HISTORY

A. FACTS[1]

[1] As defendants bring a summary disposition motion pursuant to MCR 2.116(C)(10), we must consider pleadings, affidavits, depositions, admissions, and other documentary evidence in the

This case involves an internecine family struggle for control of the profits and sales proceeds from a limited liability company (LLC), Cambridge Payment Systems (Cambridge). In the early 2000s, Laith Yaldoo (brother of plaintiffs Michael Yaldoo and Manal ("Nemo") Yaldoo), Saber Ammori (brother of plaintiff Omar Ammori), and defendant James Nafso (hereinafter "defendant") were among the owners of National Processing Services (NPS), a credit card processing company. Though Laith, Saber, and defendant Nafso served as NPS's managing owners, they did not fully control the company—outside investors owned 50 percent of NPS. The managing owners—and, according to plaintiffs, defendant in particular—did not like this share division, and sought to create a new company with fewer owners to maximize owner profits.

To obtain seed money for this venture, NPS's managing owners decided to sell NPS to Optimal, a Canadian company also involved in credit card processing. The sale was completed in July 2004, for $15 million. Laith, Saber and defendant's plan was close to fruition, but the sale to Optimal posed a problem because, as part of the deal, Optimal required all NPS owners—except defendant[2]—to sign a noncompete agreement.[3]

This noncompete agreement essentially prevented Laith and Saber from engaging in the credit card processing business for two and a half years.[4] However, it appears that Laith, Saber, and defendant sought to circumvent the noncompete. As defendant had not signed the

light most favorable to plaintiffs. See *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617–618; 537 NW2d 185 (1995); *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000); *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 663–664; 697 NW2d 180 (2005). Accordingly, some of the facts listed here are disputed by defendant, but are accepted as true for purposes of the summary disposition motion.

[2] Laith explained in his deposition that defendant's omission from the noncompete was not an accident. Defendant's payment scheme with NPS was changed purposely so that defendant would not have to sign the noncompete agreement, and defendant was kept out of the office "by design" so that he would not be present during meetings with Optimal. Saber said the same in his deposition, stating that "we had [defendant] leaving the office so Optimal wouldn't see [defendant]."

[3] In relevant part, the agreement reads:

> During the period commencing on the Closing Date and ending the date thirty (30) months after the Closing Date, Sellers shall not, from any location, without the prior written consent of Buyer, directly or indirectly, engage or invest in, own, manage, operate, finance, control, or participate in the ownership, management, operation, financing or control of, or render services of an executive, employment, advertising, marketing, sales, administrative, supervisory, or consulting nature to, any person or business that is in, or is contemplating entering into, competition with the Business of the Company [NPS] within the Territory as such Business exists as of closing date.

[4] In addition, Laith remained at Optimal as an Optimal employee immediately following the sale of NPS.

noncompete agreement, defendant was free to start a new credit card processing company, Cambridge, which he did on July 13, 2004—one week after Optimal purchased NPS. This was a scheme not only to avoid the noncompete agreement, but also to explicitly siphon what would have been Optimal's customers, with members of the family at both ends: Laith, as an officer of Optimal, and defendant, as head of Cambridge.

In an effort to avoid the requirements of the noncompete agreement, Laith and Saber agreed that their membership interest in the new company, Cambridge, would be assumed by plaintiffs—with Michael and Manal Yaldoo splitting Laith's 25 percent interest, and Omar Ammori taking Saber's 25 percent interest. Laith, Saber, and plaintiffs then funneled cash to defendant to capitalize Cambridge. Plaintiffs were fully aware that Laith and Saber did not want to be formally involved in Cambridge, and referred merchants to Cambridge to help grow its client roster. To avoid further legal complications related to the noncompete agreement with Optimal—a business with which Cambridge was explicitly competing—the ownership structure described above was made through oral agreement,[5] and it was not included in Cambridge's incorporating documents, which listed defendant as the sole member and officer of the company. Despite their formal lack of participation in Cambridge, plaintiffs considered themselves as involved in the company, and Laith and Saber considered themselves owners of the company through plaintiffs.

As such, this arrangement appeared optimal for everyone but Optimal. It certainly was a great success for defendant, who operated the company until December 2007, when he sold it for approximately $14 million. He retained all profits and sale proceeds, and did not pay plaintiffs for their share in ownership, which precipitated this suit.

B. PROCEDURAL HISTORY

In 2009, plaintiffs filed a lawsuit for: (1) breach of contract, specifically, breach of the alleged oral agreement outlining Cambridge's membership structure; (2) statutory and common-law conversion; (3) minority shareholder oppression; (4) unjust enrichment; (5) fraud; (6) breach of fiduciary duty, and (7) constructive trust. The trial court dismissed each claim, save for breach of contract, unjust enrichment, and conversion.[6] In June 2012, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10) to dismiss these claims as well, arguing, among other things, that: (1) plaintiffs could not demonstrate that a contract existed between plaintiffs, defendant, and Cambridge; (2) the alleged oral contract was unenforceable because it was a contract to commit fraud on a third party, Optimal; and (3) plaintiffs' unjust enrichment claim failed because plaintiffs have unclean hands.

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[5] Defendant denies that any such agreement existed, but, as noted, we must consider all "affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party," so we assume the existence of the oral agreement. *Dimondale*, 240 Mich App at 566.

[6] On appeal, plaintiffs have clarified that the conversion theory is premised on defendant's alleged conversion of plaintiffs' membership interests in Cambridge.

The trial court rejected defendant's motion for summary disposition, holding that: (1) plaintiffs' theory of an oral contract was supported by evidence of conduct showing the parties' intent to be bound by an oral contract; and (2) defendant's argument that plaintiffs' contract affected a fraud and caused plaintiffs' unclean hands was conclusory.

Our Court granted leave to appeal, and defendants argue that, when viewed in the light most favorable to the plaintiff pursuant to MCR 2.116(C)(10), the evidence demonstrates that: (1) the Court should not enforce the alleged Cambridge membership agreement because it is a fraud designed to deprive Optimal of the benefit of its bargain; (2) the claim of unjust enrichment is barred by plaintiffs' unclean hands; and (3) the common law and statutory conversion claims fail because plaintiffs had no membership interest in Cambridge as a matter of law.

II. ANALYSIS[7]

A. BREACH OF CONTRACT

> Courts cannot occupy themselves with adjusting equities between wrong doers. When parties associate for an unlawful purpose, they must calculate in advance the probabilities of bad faith towards each other, and must expect no assistance of the law against each other's frauds. [*Gage v Gage*, 36 Mich 229, 231 (1877) (COOLEY, CH J).]

Justice Cooley's statement recognizes a distinction between enforceable and unenforceable contracts that lies at the heart of contract law. Enforceable contracts involve a proper subject matter that does not contradict public policy. *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 54; 672 NW2d 884 (2003). Unenforceable contracts involve an *improper* subject matter that *does* contradict public policy. Put simply, "contracts that violate public policy may not be enforced." *Laffin v Laffin*, 280 Mich App 513, 521; 760 NW2d 738 (2008), citing *Rory v Continental Ins Co*, 473 Mich 457, 491; 703 NW2d 23 (2005).[8]

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[7] A trial court's decision on a motion for summary disposition is reviewed de novo. *Cowles v Bank West*, 476 Mich 1, 13; 719 NW2d 94 (2006). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim, and is granted where "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, "leaves open an issue on which reasonable minds might differ." *Id*. A court must consider the pleadings, "affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party." *Dimondale*, 240 Mich App at 566.

[8] Plaintiffs attempt to limit this basic contract principle to suits in equity by emphasizing that the "unclean hands theory" only applies in equity actions. This distinction, however, is not a distinction—it is a conflation. It is a foundational principle of contract law that a court will not enforce a contract that is against public policy. In addition to the sources cited above, see *In re Teller's Estate*, 200 Mich 181, 185; 166 NW 865 (1918) ("[i]t is a well-understood rule that

An agreement between two parties to defraud a third party obviously contradicts public policy, and courts will not enforce such an agreement. *Weller v Weller*, 344 Mich 614, 622; 75 NW2d 34 (1956), referencing *Cook v Wolverine Stockyards Co*, 344 Mich 207, 209–210; 73 NW2d 902 (1955).

Here, as noted, we assume the existence of the alleged oral agreement that divided ownership of Cambridge between plaintiffs (holding such interest for Laith and Saber, but also retaining some expectation of profits for themselves) and defendant. But if we accept plaintiffs' evidence as true, the contract they seek to enforce is a contract to defraud Optimal. It was an effort to circumvent the noncompete agreement, and use the NPS sale proceeds provided by Optimal to create a new venture that explicitly competed with Optimal.[9] This is exactly the sort of agreement against a third party that a court cannot and will not enforce. Accordingly, we reverse the trial court's denial of defendant's motion for summary disposition as to plaintiffs' claim of breach of contract.

B. UNJUST ENRICHMENT

The premise of plaintiff's unjust enrichment claim is predicated on their claim for breach of contract: namely, that defendant entered into an oral agreement with plaintiffs that created a shared ownership structure for Cambridge—one that would entail the division of profits and any

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courts will not extricate parties from a situation in which, by their own acts, they have placed themselves in perpetrating, or attempting to perpetrate, a fraud on others"); 2 Farnsworth on Contracts (3d ed), § 5.1; 7 Williston on Contracts (4th ed), § 16:14 ("[i]n general, a bargain which contemplates a wrong to a third person, or to undefined members of the public, whether trespass, breach of trust or fraud, is illegal"); Restatement (First) of Contracts, § 576 ("[a] bargain, the making or performance of which involves breach of a contract with a third person, is illegal"). See also Restatement (First) of Contracts, § 576 cmt a ("[s]ince breach of contract is a *legal* wrong, a bargain that requires for its performance breach of contract with another, is opposed to public policy") (emphasis added).

Recognizing the above does nothing to diminish the force of the unclean hands doctrine in an equity context—which we will return to later. It simply acknowledges that similar principles operate *at law* as well.

[9] Plaintiffs cite *Buckingham Tool Corp v Evans*, 35 Mich App 74, 78; 192 NW2d 362 (1971) in support of their assertion that it is possible for an individual limited by a noncompete agreement to "lend money, extend credit or the like to a person [not limited by a noncompete agreement] about to engage in a competing business." As defendant notes, however, this case is easily distinguishable—*Buckingham* involved a father attempting to help his son start a new tool and die business, and the father retained no "financial interest in [the business]" nor "counsel[ed] his son as to business matters." *Id.* Our case presents exactly the reverse situation: plaintiffs—by their own admission, operating on behalf of individuals who signed a noncompete agreement—seek to recover their claimed financial interest in the competing business. In addition, the *Buckingham* defendant helped finance the allegedly competing business three years after he signed the noncompete agreement. *Id.* at 77. By contrast, plaintiffs and defendant set up Cambridge *one week* after their relatives signed a noncompete agreement with Optimal.

sale proceeds. As noted, if this contract actually exists, it is simply a method of avoiding another legal obligation: the noncompete agreement with Optimal. Just as an attempt to enforce an agreement based on fraud cannot prevail at law, an attempt to enforce such an agreement, based on fraud, cannot prevail at equity.

A claim for unjust enrichment is an equitable remedy. *Tkachik v Mandeville*, 487 Mich 38, 48; 790 NW2d 260 (2010). A party with unclean hands may not assert claims for equitable relief such as a claim for unjust enrichment. *Attorney Gen v PowerPick Player's Club of Mich, LLC*, 287 Mich App 13, 52; 783 NW2d 515 (2010). In *Rose v Nat'l Auction Group*, 466 Mich 453, 463; 646 NW2d 455 (2002), our Supreme Court explained the clean hands doctrine as follows:

> [T]he clean hands doctrine has been applied to deny equitable relief to parties to a fraudulent contract:
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> > *If a contract has been entered into through fraud, or to accomplish any fraudulent purpose*, a court of equity will not, at the suit of one of the fraudulent parties . . . while the agreement is still executory, either compel its execution or decree its cancellation, nor after it has been executed, set it aside, and thus restore the plaintiff to the property or other interests which he had fraudulently transferred. [2 Pomeroy supra, §401, p 105.] [Emphasis added.]

In other words, "any willful act in regard to the matter in litigation, which would be condemned and pronounced wrongful by honest and fair-minded men, will be sufficient to make the hands of the applicant unclean." *Rose*, 466 Mich at 466 (citations omitted). Further, "a person cannot avoid the clean hands doctrine by 'relying' on advice or inducement to engage in a course of conduct where it is plainly evident that the conduct is illegal or unethical." *Id*. at 465–466. Just as courts will not enforce a contract designed to harm a third party, courts will deny equitable relief when "the misconduct [is] directed at unrelated third parties," if the claims made by "plaintiff [are] inextricably tied to the plaintiff's wrongdoing." *McFerren v B&B Investment Group*, 253 Mich App 517, 524; 655 NW2d 779 (2002).

As noted, plaintiffs compromised any right to equitable relief by participating in an effort to defraud Optimal in violation of the noncompete agreement. Even if true, it does not matter if they merely followed the advice of Laith and Saber, enabling the violation of such an agreement is "plainly . . . illegal or unethical." *Rose*, 466 Mich at 465–466. Having participated in an act "which would be condemned and pronounced wrongful by honest and fair-minded men," plaintiffs cannot demand equitable relief. *Id*. at 466 (citations omitted). We therefore reverse the trial court's denial of defendants' motion for summary disposition as to plaintiffs' claim of unjust enrichment.[10]

[10] As discussed above, plaintiffs cannot pursue a claim for legal or equitable relief, because the relief they seek is predicated on a fraud. Accordingly, their conversion claim fails as well.

III. CONCLUSION

We reverse the ruling of the trial court, and grant defendants' motion for summary disposition on all claims pursuant to MCR 2.116(C)(10).

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly